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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2439**

Veronica Renee Ellis, petitioner,
Respondent,

vs.

Matthew Russell Jacob,
Appellant,

Pamela Standing-Brumbaugh, intervenor,
Respondent.

**Filed September 9, 2008
Affirmed.
Connolly, Judge**

Becker County District Court
File No. F4-06-50275

Veronica R. Ellis, 6640 Humboldt Avenue North, Apt. 202, Minneapolis, MN 55430 (pro se respondent)

Diana Longrie, 1321 Frost Avenue East, Maplewood, MN 55109 (for appellant)

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Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's decision granting sole legal and physical custody of his two children to intervenor, arguing that the district court (1) erred by applying Minn. Stat. § 257C.03 (2006) instead of Minn. Stat. § 518.18 (2006) in its analysis and (2) abused its discretion when applying Minn. Stat. § 257C.03. Because the district court properly applied Minn. Stat § 257C.03 and because it was not an abuse of discretion to award sole physical and legal custody of the children to intervenor, we affirm.

FACTS

Respondent-intervenor Pamela Standing-Brumbaugh (intervenor) is appellant Matthew Jacob's mother. Appellant was formerly involved in a relationship with respondent Veronica Ellis (respondent). The couple have two children together: D.D., born July 11, 2000, and D.J., born December 4, 2003. The children's physical and legal custody is the subject of this appeal.

Respondent currently has no physical or legal custody rights to the children, and has not taken an active role in the present court proceedings. The children were initially placed in intervenor's care by respondent in May 2004. On July 25, 2005, appellant was awarded sole physical custody of the children and joint legal custody, shared with intervenor. Following this decision, intervenor filed an ex parte request for temporary custody. A temporary order granting intervenor immediate temporary sole physical and

legal custody of the children was filed on March 7, 2006. An order continuing temporary legal and physical custody of the children with intervenor was filed on June 16, 2006.

On October 18, 2006, intervenor filed a “motion” seeking permanent physical and legal custody of the children. She argued that she was an interested third-party pursuant to Minn. Stat. § 257C.03, and that clear and convincing evidence established that the children would be hurt by living with appellant. After an evidentiary hearing, the district court agreed, concluding: “It is in the best interest of the children that [intervenor] is awarded the sole physical and legal custody of [both children,] subject to [appellant’s] reasonable unsupervised parenting time.” This appeal follows.

DECISION

This court’s review of custody determinations is limited to deciding whether the district court abused its discretion by making findings unsupported by the evidence or by improperly applying the law. *Silbaugh v. Silbaugh*, 543 N.W.2d 639, 641 (Minn. 1996). In this case, appellant challenges the district court’s use of Minn. Stat. § 257C.03 when it granted sole legal and physical custody of the children to intervenor, arguing that Minn. Stat. § 518.18 is the applicable statute because intervenor was, instead of attempting to seek custody, attempting to modify the existing custody arrangement outlined in the July 25, 2005 custody order. Statutory construction is a question of law, which this court reviews de novo. *Brookfield Trade Ctr., Inc. v. County of Ramsey*, 584 N.W.2d 390, 393 (Minn. 1998). As such, this court is not bound by and need not give deference to a district court’s conclusion on this issue. *Modrow v. JP Foodservice, Inc.*, 656 N.W.2d 389, 393 (Minn. 2003).

Appellant's argument is unavailing. In the district court, intervenor sought custody of the children as an interested third-party. *See* Minn. Stat. § 257C.01, subd. 3 (2006) (defining interested third-party). Normally, after making a prima facie case for being an interested third-party, the party seeking classification as an interested third-party presents evidence supporting their claim in an evidentiary hearing before the district court. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 569-70 (Minn. 2006). In the present case, this procedure was not followed and no such hearing was held; however, this is not fatal to intervenor's classification as an interested third-party because appellant never challenged intervenor's classification in the district court. As such, appellant cannot now be heard to complain about intervenor's classification as an interested third-party. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider 'only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.'" (quoting *Thayer v. American Financial Advisers, Inc.*, 322 N.W.2d 599, 604 (Minn. 1982))). We find nothing in the record to suggest that intervenor is not an interested third-party.

Turning next to the question of whether intervenor was attempting to seek custody of the children or modify an existing custody order, we hold that she was attempting to seek custody of the children. Minn. Stat. § 257C.03 applies when "an individual other than a parent" files a "petition *seeking* custody." Minn. Stat. § 257C.03, subd. 1(a) (emphasis added). In this case, intervenor was clearly seeking custody of the children. Specifically, she was seeking permanent sole legal and physical custody of the children. "Legal custody" and "physical custody and residence" are both listed under the statutory

definition of custody. Minn. Stat. § 518.003, subd. 3(a), (c) (2006). Thus, because intervenor was seeking permanent custody of the children, the “motion” she filed was essentially a petition under Minn. Stat. § 257C.03, and the district court correctly determined that Minn. Stat. § 257C.03 provided the applicable framework to analyze this issue.

Second, the district court previously awarded intervenor temporary physical and legal custody of the children in March 2006 and again in June 2006, but it did not identify the authority for doing so. Under chapter 257, regarding parentage proceedings, awards of temporary custody are guided by chapter 518. *See* Minn. Stat. § 257.66, subd. 3 (2006) (stating that custody in parentage proceedings is determined under Minn. Stat. § 257.541 (2006) and that subsequent matters are to be determined under Minn. Stat. chapters 518 and 518A); Minn. Stat. § 257.541, subd. 1 (stating that mother retains custody of a child born out of wedlock until custody is determined under Minn. Stat. § 518.156 (2006)). And in proceedings under chapter 518, temporary relief is awarded under Minn. Stat. § 518.131 (2006). Similarly, in third-party custody proceedings under chapter 257C, awards of temporary custody are also guided by Minn. Stat. § 518.131. *See* Minn. Stat. § 257C.03, subd. 5 (stating that awards of temporary relief are to be “guided” by the factors in Minn. Stat. § 518.131 and the statute containing the applicable substantive law). Thus, regardless of the authority under which the awards of temporary custody were made, the governing statute was Minn. Stat. § 518.131. And under Minn. Stat. § 518.131, subd. 9, a temporary order “[s]hall not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding.” Thus,

here, because intervenor was seeking permanent custody of the children after an award of temporary custody, the prior award of temporary custody was statutorily precluded from prejudicing the parties' rights at the hearing on her "motion" for permanent custody. Alternatively stated: Intervenor was not seeking to modify custody with the high threshold that custody modification implies. *See* Minn. Stat. § 518.18 (addressing standard for modifying custody).

In sum, the district court correctly determined that Minn. Stat. § 257C.03 provided the analytical framework for deciding custody in this case because intervenor was an interested third-party who was seeking custody of the children and we reject appellant's argument that her petition was an attempt to modify custody under Minn. Stat. § 518.18. *See* Minn. Stat. § 257C.03 ("In a court of this state with jurisdiction to decide child custody matters, a de facto or third-party child custody proceeding may be brought by an individual other than a parent by filing a petition seeking custody . . .").

Once it has been established that an individual seeking custody is an interested third-party, a district court must determine whether it is in a child's best interest to grant custody to the interested third-party. Minn. Stat. § 257C.03, subd. 7(c). The district court found, after analyzing the 12 best interest factors found in Minn. Stat. § 257C.04, subd. 1(a) (2006) that it was in the children's best interest to grant intervenor sole legal and physical custody. Appellant challenges this determination, arguing that the district court's findings are not supported by evidence in the record. In order to successfully challenge a district court's findings of fact, the party challenging the findings "must show that despite viewing that evidence in the light most favorable to the trial court's findings

. . . the record still requires the definite and firm conviction that a mistake was made.” *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000). “That the record might support findings other than those made by the trial court does not show that the court’s findings are defective.” *Id.*

1. *The wishes of the party or parties as to custody.* Minn. Stat. § 257C.04, subd. 1(a)(1).

The district court found that: the children’s mother had previously expressed a wish that the children stay under intervenor’s supervision, intervenor desires sole legal and physical custody, and appellant opposes intervenor’s desire and wishes to have sole legal and physical custody of the children.

2. *The reasonable preference of the children, if the court deems the children to be of sufficient age to express preference.* Minn. Stat. § 257C.04, subd. 1(a)(2).

The district court found that the children were too young to express an appropriate preference.

3. *The children’s primary caretaker.* Minn. Stat. § 257C.04, subd. 1(a)(3).

The district court found that intervenor has been the children’s primary caretaker for at least the last two and one-half years.

4. *The intimacy of the relationship between each party and the children.* Minn. Stat. § 257C.04, subd. 1(a)(4).

The district court found that the children have a close relationship with intervenor that is more intimate than the one they share with appellant.

5. *The interaction and interrelationship of the children with a party or parties, siblings, and any other person who may significantly affect the children’s best interests.* Minn. Stat. § 257C.04, subd. 1(a)(5).

The district court found that the interaction and interrelationship between the children and appellant has been sporadic and inconsistent. The district court went on to find that intervenor is the party that has been maintaining the relationships with those persons who are important in the lives of the children.

6. *The children's adjustment to home, school, and community.* Minn. Stat. § 257C.04, subd. 1(a)(6).

The district court found that the children have adjusted well to intervenor's home, school, and community.

7. *The length of time the children have lived in a stable, satisfactory environment and the desirability of maintaining continuity.* Minn. Stat. § 257C.04, subd. 1(a)(7).

The district court found that the children have been living primarily at intervenor's home since their birth and almost exclusively since March 2006. The district court found that there was no evidence that the children have ever enjoyed a stable and satisfactory home environment with appellant.

8. *The permanence, as a family unit, of the existing or proposed custodial home.* Minn. Stat. § 257C.04, subd. 1(a)(8).

The district court found that, based upon intervenor's history of caring for the children, she would provide them with a permanent family unit. Regarding appellant, the district court found that his history does not indicate any permanence in living arrangements or stability in the home.

9. *The mental and physical health of all individuals involved.* Minn. Stat. § 257C.04, subd. 1(a)(9).

The district court found that appellant failed to follow through on medical treatment for a fungal infection on D.D.'s scalp. The district court found that it was

intervenor who provided the necessary medical follow through and that there was no indication that she would fail to do so in the future.

10. *The capacity and disposition of the parties to give the children love, affection, and guidance, and to continue educating and raising the children in the children's culture and religion or creed, if any.* Minn. Stat. § 257C.04, subd. 1(a)(10).

The district court found that intervenor has shown that she has given the children love, affection, and guidance. This was demonstrated by, among other things, her commitment to keeping the children's education on track. In contrast, the district court found that while appellant has demonstrated his love for the children, he has failed to establish that he is committed to his children. The district court found that this was demonstrated by appellant's history of not bringing the children to school when they were supposed to be in attendance.

11. *The children's cultural background.* Minn. Stat. § 257C.04, subd. 1(a)(11).

The district court found that the children's multi-ethnic cultural background has been promoted by intervenor. The district court found that, on the other hand, appellant had failed to express an interest in the children's cultural background and appeared irritated by intervenor's attempts to educate the children about their cultural background.

12. *The effect on the children of the actions of an abuser.* Minn. Stat. § 257C.04, subd. 1(a)(12).

The district court found that domestic-abuse issues surrounding appellant support the position that it is in the children's best interest to award intervenor sole legal and physical custody. While appellant disagrees with these findings and the accompanying conclusion, he does not provide any support that would allow us to reach a definite and

firm conviction that a mistake was made. Appellant takes issue with the weight the district court gave to intervenor's testimony; however, it is not our role to second guess a district court's weight and credibility determinations. *J.L.B. v. T.E.B.*, 474 N.W.2d 599, 603 (Minn. App. 1991), *review denied* (Minn. Oct. 11, 1991). Appellant also points out that no neglect charges have been filed against him. Even though this is true, it is in no way dispositive on the issue of whether it is in the children's best interest to award intervenor grandmother sole legal and physical custody of the children. The majority of appellant's remaining argument on the best interests' issue rests on the assumption that the district court erred in applying Minn. Stat. § 257C.03 instead of Minn. Stat. § 518.18; however, as explained above, the district court properly applied the framework provided in Minn. Stat. § 518.18 in resolving this issue. Finally, our review of the record indicates that it supports the findings reached by the district court.

Appellant has provided us with scant support for the claim that the district court incorrectly determined that, under the test outlined in Minn. Stat. § 257C.03, it is in the children's best interests to award sole legal and physical custody to intervenor. Based on the district court's thoughtful, thorough, and complete analysis and the failure of appellant to point to any evidence that would be sufficient for us to reach a definite and firm conviction that a mistake was made, we affirm the judgment of the district court.

Affirmed.